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In the Supreme Court of the United States

OCTOBER TERM, 1959

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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CITATIONS

Cases:

Friedman v. *United States*, 200 F. 2d 690, certiorari denied, 345 U.S. 926 — 4

United States v. *Marcus*, 213 F. 2d 230, certiorari denied, 348 U.S. 824 — 4

Rule:

Rule 32(d), F. R. Crim. P. — 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 610

JOE DELEGAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-8) is reported at 271 F. 2d 279. The findings and conclusions of the district court (R. 30-31) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1959. A petition for rehearing was denied on November 25, 1959. The petition for a writ of certiorari was filed on December 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion, after sentence, to withdraw his plea of guilty was properly denied.

RULE INVOLVED

Rule 32(d), F. R. Crim. P., provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner pleaded guilty on November 10, 1958, in the United States District Court for the Southern District of Georgia, to an indictment charging him with knowingly possessing 32 gallons of non-tax paid whiskey in violation of 26 U.S.C. (1952 ed., Supp. V) 5008(b)(1) (R. 2, 4). On February 11, 1959, he was sentenced to two years' imprisonment (R. 12).

On February 27, 1959, petitioner made a motion to withdraw the plea, stating that the plea of guilty had been entered on November 10, 1958, by petitioner's attorney without petitioner being present; that petitioner first learned of the plea when he appeared for sentencing on February 11, 1959; that he allowed the plea to stand without objection for the reason that he was advised that such a plea offered the only possibility that he might obtain probation; but that he was not guilty of the offense charged (R. 13-15).

Petitioner testified to this effect at a hearing on the motion (R. 18-25). The transcript of record showed that, when the plea was entered on November 10, 1958, and sentence deferred to a later date, the trial judge addressed the petitioner directly, asking him whether he was related to the Delegals in Brunswick, and that petitioner stated that he was one of the Delegals from Liberty County (R. 4-5). In addition, petitioner's former attorney testified that petitioner was present when the plea of guilty was entered; that, from the time petitioner engaged him, petitioner told the attorney that he wanted to plead guilty and wanted his attorney to do what he could to get him probation; and that the attorney expressed doubts as to the possibility of probation because petitioner had a prior record (R. 27). The transcript of the proceedings at the time of sentencing shows that petitioner's attorney argued that petitioner should be given probation because of the fact that he was supporting a sister and her children as well as his own, but that the judge refused to suspend sentence because of petitioner's prior record (R. 6-11).

The district court denied the motion to withdraw the plea, finding that petitioner "was present in Court and consented to the entering of the plea" and that "no facts appear entitling [petitioner] to withdraw his plea" (R. 30). The court of appeals affirmed.

ARGUMENT

Under Rule 32(d), a motion to withdraw a plea of guilty after sentence may be granted only "to cor-

rect manifest injustice." No such showing was made here. Petitioner was present at the time the plea was entered and at the time of sentencing.

The record supports the conclusion that petitioner's plea was knowingly entered in the hope that his attorney could persuade the district court to suspend sentence. Disappointment in the sentence is not a basis for permitting withdrawal of a plea. *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Friedman* v. *United States*, 200 F. 2d 690, 696-697 (C.A. 8), certiorari denied, 345 U.S. 926. Certainly, under these circumstances, the district court did not abuse its discretion.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1960.

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